

DIRECT DIAL: (415) 544-1102

February 2, 2001

Mr. Rick Buell
California Energy Commission
1516 Ninth Street
Sacramento, CA 95814-5512

Re: February 5, 2001 Workshop for Three Mountain Power; Docket 99-AFC-2

Dear Rick:

In preparation for Staff's February 5, 2001 workshop, Three Mountain Power has reviewed your January 31, 2001 letter and Staff's new set of draft conditions (Staff's New Conditions) describing Staff's new alternative approach to mitigation for the Project's potential well interference impacts.

Your January 31 letter was helpful insofar as it explained some of the reasons behind Staff's agreement or disagreement with the specific conditions of certification submitted by Three Mountain Power with its January 9, 2001 Opening Brief (Three Mountain Power's Conditions). However, your letter did not explain the reasons behind Staff's new approach and many of the changed provisions in Staff's New Conditions, including the new and previously not discussed mitigation requirements in Staff's New Conditions (i.e., Staff's new S&W 16 and 19). We expect that Staff will be able to provide needed explanation and clarification at the workshop. However, because of our interest in making this last workshop as productive as possible for everyone involved, Three Mountain Power did not want to wait until the workshop to provide Staff and other parties with Three Mountain Power's comments on Staff's New Conditions, which were distributed just 2 days ago. Our major substantive comments are set forth below in this letter.

The well interference conditions of certification can be grouped, generally, into seven areas:

(1) testing of Project wells;

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- (2) calculation of well interference impacts using results of tests of Project wells;
- (3) identification of wells that are significantly impacted by Project pumping, i.e., (a) wells that are physically impacted (significantly), and (b) wells that are financially impacted (significantly);
- (4) mitigation plan for physically impacted wells;
- (5) mitigation plan for financially impacted wells;
- (6) timing of beginning of Project pumping (and related issues); and
- (7) newly added (and previously not discussed) conditions of certification.

We have grouped our major substantive comments on Staff's New Conditions into these same seven areas:

1. Testing of Project wells. It appears that Staff and Three Mountain Power are in substantial agreement regarding the testing of Project wells. We can confirm that at the workshop.

However, in the verification for S&W 9 in Staff's New Conditions and in other places in Staff's New Conditions, we think that the timeline which requires that Three Mountain Power perform certain tasks at specified periods of time before other tasks, or a specified period of time before turbine roll, is unduly restrictive and unnecessary. Given that Staff is now proposing that Three Mountain Power fund all physical mitigation work prior to the Project's first turbine roll, we see no need to tie Three Mountain Power's performance of each condition to a specific timeline (for example, that aquifer testing be performed at least seven months prior to turbine roll). The CEC's ultimate hammer over the Project is the requirement that turbine roll cannot occur until Three Mountain Power has funded the physical mitigation work. This requirement is the same under Three Mountain Power's Conditions and under Staff's New Conditions, except that Staff suggests that there be a 60 day delay between funding of physical mitigation work and turbine roll (a delay to which we also object, as discussed under paragraph 4 below). The CEC's ultimate hammer (the ability to delay turbine roll if these conditions are not satisfied) is by itself sufficient to achieve the CEC's objectives and the additional 60 day delay in turbine roll is unnecessary.

2. Calculation of well interference impacts using results of tests of Project wells. In S&W 10 in Staff's New Conditions, there is a new section with the heading "Well reliability impacts". This section introduces a new concept regarding the Project's maximum rate of pumping and defines it as "the maximum rate that the project shall pump during any one-month period during the life of the project." It is unclear what this section is intended to accomplish. It

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is internally inconsistent with the bullets that appear later on in S&W 10 in Staff's New Conditions. (And, as we have pointed out previously, Staff's version of these bullets is itself internally inconsistent.) We request that Staff explain at the workshop the purpose of each of these sections and also explain how these sections are consistent with each other.

Further, S&W 10 in Staff's New Conditions proposes to use a calculated drawdown of two feet as the basis for a threshold determination of a significant impact. Staff's cover letter states that "We only see evidence in the record to support two feet, not five feet, for the trigger for ensuring well reliability that requires well modifications." We disagree. Staff initially proposed a threshold of five feet in this proceeding. That's on the record. At hearings, Three Mountain Power's expert hydrogeologist witness testified that Three Mountain Power's conditions of certification, which also use a threshold of five feet, mitigate all significant impacts. That is also on the record in this proceeding. Staff used this same threshold of five feet in the Blythe project. And, while Staff has argued to us (verbal comm., R. Buell to L. Toth) that five feet as a threshold for determining the significance of an impact was appropriate for the Blythe project but is inappropriate for Three Mountain Power because of differences in the aquifers, it is unclear what scientific support exists for this argument. Aquifer characteristics make no difference to a pump. A pump only knows if it is submerged. If it is submerged, it will pump; if it is not submerged, it will not pump. In light of these facts, Three Mountain Power requests that Staff clarify and explain why a calculated drawdown of five feet as the basis for a threshold determination of a significant impact was satisfactory for the Blythe project but is not satisfactory for the Three Mountain Power Project.

3. Identification of wells that are significantly impacted by Project pumping.

(a) Wells that are physically impacted.

This is an area of major disagreement between Staff and Three Mountain Power. Staff believes that a calculated change in water level alone (and, now, a two foot change, as discussed above) constitutes a significant impact which must be mitigated even if there is no effect on the ability of the well to produce the quantities of water that the well produced prior to Project pumping. This reflects a misunderstanding of CEQA's requirements. CEQA only requires analysis and mitigation of an environmental impact if that impact is significant. Public Resources Code 21100(b)(1), (b)(3). The statute governing the Energy Commission as a certified regulatory program under CEQA likewise requires mitigation only for any significant adverse effect. Public Resources Code 21080.5(d)(2)(A).

The Staff's position on this issue confuses the determination of whether there is some physical impact with the determination of whether that impact is significant. The determination whether there is some physical impact or change in the environment relates to whether the proposed action is a project requiring some level of review under CEQA. Public Resources Code

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21065 (defining a project subject to CEQA based on physical change in the environment without reference to the significance of the change). For purposes of determining mitigation, first, there must be an impact and, second, the impact must be significant. A calculated change in water levels alone is not an impact, much less a significant one if it has no impact on anyone. Such a calculation is only an estimate of a possible impact that may be significant.

Three Mountain Power's Conditions make clear that, after the calculation of potential impacts is performed, there must be a physical inspection of each well to determine whether or not the well would actually be physically impacted as a result of the calculated change in water levels. Staff still has not identified what significant impact is being caused by the Project that is being mitigated by Staff's New Conditions. A simple reduction in aquifer level of two feet, in and of itself, is not a significant impact. This is a critical flaw in Staff's New Conditions and its previous proposals.

Three Mountain Power's Conditions (and its Opening Brief) include a highly detailed description of the steps necessary to identify, first (based on a calculation), which wells are potentially impacted wells, and, second (based on physical inspection of the wells), which wells will actually be physically impacted. Unless there is a reasonable expectation of a physical impact on the well's ability to produce water, there is no basis for requiring mitigation.

(b) Wells that are financially impacted.

In S&W 10 in Staff's New Conditions, Staff continues to use a drawdown of five feet or more as basis for a threshold determination of a significant impact. We agree with this.

We do not understand the reasons behind the new references to monthly project pumping. This is a new concept that Staff has not explained and does not make sense to us.

4. Mitigation plan for physically impacted wells.

In this area, Staff's New Conditions reflect one substantial conceptual change in approach that Three Mountain Power finds very promising. While the details of Staff's plan are not provided, Staff's New Conditions, as we understand them, provide that once physically impacted wells are identified (which we have not yet agreed upon), Three Mountain Power will fund an account (to be administered by the CEC) with a total amount of funds that would be sufficient to replace each physically impacted well. This would serve the purpose of ensuring that mitigation funds are available assuming a worst case scenario, i.e., that each and every physically impacted well requires the maximum mitigation possible: total replacement.

While this worst case approach is excessive, Three Mountain Power acknowledges that this approach at least puts a quantifiable limit on Three Mountain Power's potential maximum liability for mitigation for physical well impacts. And, because Three Mountain Power is

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confident, based on the opinions provided by its expert hydrogeologists, that there will be a minimal, if any, number of physically impacted wells, Three Mountain Power is willing to pursue further discussion of this approach with Staff.

As we understand it, this approach requires that the mitigation account to be administered by the CEC is fully funded by Three Mountain Power and physically impacted well owners are notified of the availability of mitigation funds. After that, Three Mountain Power may commence operation of the Project with no further requirement that it be involved in the determination or approval of specific mitigation for physically impacted well owners. The determination of appropriate mitigation and the disbursement of funds by the CEC from the mitigation fund is completely in the hands of the CEC, working together with physically impacted well owners. (We note that this model is similar to the model agreed upon for mitigating potential impacts to the Shasta crayfish.) This general conceptual approach is acceptable to Three Mountain Power provided that necessary terms and conditions can be agreed upon.

A few of the more important terms and conditions are as follows:

- Staff's New Conditions do not explain how the CEC determines what the amount of money required to replace all of the affected wells identified in the well interference report. This is a critical step that cannot be overlooked. We will be prepared to address this at the workshop. It is important that Staff also be prepared to address this at the workshop.
- Staff's New Conditions require the project owner to notify owners of affected wells by return receipt mail and then provide the CPM with copies of the return receipts. Obviously, if an affected well owner is not at home (the snowbird example raised by Burney Resource Group), there will never be a return receipt. Three Mountain Power, however, is willing to have such notices sent either by the CPM or by Three Mountain Power, either by overnight courier or by any other service selected by the CPM, and Three Mountain Power will pay for the cost of such delivery. However, after the delivery service confirms that delivery has been attempted on no more than three occasions (as overnight courier services routinely do) or that the notice has been received, the notice requirement must be deemed fulfilled (and the condition must be deemed satisfied).
- We note that Staff's decision tree suggests that the CPM may approve or reject the notice of available mitigation. We cannot imagine on what basis the CPM would reject the giving of notice. This should be changed to specify simply that the CPM shall confirm compliance with the notice requirement. Further, rather than take more time for a separate notice requirement and a separate approval, we suggest that notices be sent out simultaneously with the funding of the mitigation account or that notices be sent out by the CPM. That would save time and eliminate unnecessary approvals by the CPM.

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- The project owner should not be required to postpone turbine roll for 60 days after the notice. This is unreasonable. Once Three Mountain Power has funded the worst case mitigation account, Three Mountain Power's mitigation obligations are completed and the Project can begin its operations and begin pumping water immediately thereafter. Again, we remind parties of the fact that potential impacts are being evaluated over the *life* of the Project and there is no reason to believe that there will be any immediate impacts to neighboring well owners once Project pumping begins. As described in Three Mountain Power's reply brief:

Drawdown in an aquifer decreases with distance from the pumping well. [cite omitted] Therefore, drawdown in the aquifer at distance away from BWD Well No. 7, even pumping at 3,700 gpm, would be less than 2 feet everywhere, and would likely be immeasurable (less than about 0.1 foot) at distances greater than about 5 feet from this well. This demonstrates that it is extremely unlikely that the Three Mountain Power wells will produce sufficient drawdown to cause significant interference with neighboring wells.

5. Mitigation plan for financially impacted wells.

Staff has provided no explanation for its substantial rewrite of Three Mountain Power's mitigation plan for increased energy costs for commercial and other large well owners. We do not understand the reasons behind Staff's changes. We do not expect the mitigation plan for Three Mountain Power's reimbursement of commercial and other large well owners to be contentious and it need not be complicated. Staff's new condition is drafted such that Three Mountain Power's ability to satisfy the condition depends on the cooperation of affected well owners. For reasons previously detailed in our other filings, we reject this approach to mitigation as unnecessarily jeopardizing the viability of the Project. There are also other new additions to this mitigation plan that we do not understand. We request that Staff review Three Mountain Power's Conditions, which we believe are clear, detailed and protective of neighboring well owners, and provide comments at the workshop on any aspects of our proposal that Staff would like to modify.

6. Timing of Project pumping.

As described in paragraph 4 above, we understand that Staff's New Conditions allow Project pumping to begin once aquifer testing is completed, the calculation of potential well interference impacts is completed, physically impacted wells and financially impacted wells have been identified and Three Mountain Power has funded the mitigation account administered by the CEC and notified physically impacted well owners. There are no other conditions or contingencies that affect the Project's ability to begin pumping water. This approach ensures that any physically impacted well owner that desires to receive mitigation funds prior to Project pumping has the right to do so. Actions or inactions of well owners (or the CEC) cannot impair

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the right of the Project to commence pumping at this point. This is a very positive aspect of Staff's New Conditions from our perspective.

In response to the comment made by Staff in paragraph 1 of its January 31 letter, we also want to confirm that Three Mountain Power can easily demonstrate to the Project's lenders that a properly designed aquifer test can be conducted prior to the scheduled date for first turbine roll and that the first turbine roll will not be materially delayed as a result of this commitment. In the water supply agreement executed by Burney Water District and Three Mountain Power almost a year ago and docketed on multiple occasions in this proceeding, Burney Water District indicated its intent to increase its water storage capacity to 4 million gallons and, as a contribution to the community, Three Mountain Power agreed to fund this increase in storage capacity. The increase in storage capacity is described as one of the Additional Facilities in the water supply agreement. (Additional Facilities under the water supply agreement are defined as facilities which Burney Water District intended to construct for the benefit of the community (not for Three Mountain Power's project), but that Three Mountain Power agreed to fund as a contribution to the community.) Three Mountain Power did not expect to use this storage capacity for storage during aquifer testing because Staff had proposed that aquifer testing would be completed once the Project was operational (thus, there would be no need to use such storage for aquifer testing).

Before entering into the water supply agreement with Three Mountain Power, Burney Water District had already agreed, as part of its EDA project (EDA award 07-01-03914), to evaluate the relative costs of installing 2 two-million gallons tanks or 1 four-million gallon tank to increase its storage capacity. To complete the evaluation, complete bids were obtained by Burney Water District for both options. A full environmental review of the EDA project, including the four million gallon tank option, was also completed by Burney Water District.

At the time of Three Mountain Power's hearings, it was not known whether Burney Water District would choose to install the 2 two-million gallon tanks or 1 four-million gallon tank. However, when Staff and other parties, in the days prior to hearings, proposed that the Project be compelled to operate in a dry cooling mode for a possibly extended period of time while aquifer test results were approved and permanent mitigation was developed and implemented, Three Mountain Power recognized that early installation of Burney Water District's four million gallon tank would provide storage capacity for aquifer testing sufficiently in advance of the Project's scheduled first turbine roll (so as not to delay turbine roll). Early installation of the four-million gallon tank would allow aquifer testing to be completed and other steps taken to make mitigation payments available for any physically impacted well owners prior to the first turbine roll.

In light of the change in position by Staff and other parties, Three Mountain Power contacted Burney Water District and received satisfactory assurances that Burney Water District

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will install the four million gallon storage tank *as part of the EDA project* so that it would precede Burney Water District's timing for construction of the Project wells. (EDA award 07-01-03914.) On January 24, the Board of Directors of Burney Water District approved the contract for construction of the four-million gallon tank. The tank is expected to be completed and in service in October 2001. We believe that the action of Burney Water District's Board is sufficient assurance for the Project's lenders and should be sufficient for the CEC's purposes as well.

7. Newly added (and previously not discussed) conditions of certification.

New S&W 16: This new condition introduces a post-mitigation capacity test. This is a new concept that no one has ever proposed at any time in this proceeding. In Three Mountain Power's Conditions, this test was unnecessary because the determination whether there is actually a significant impact would be made before mitigation is undertaken. We do not understand this condition and request that Staff explain its purpose at the workshop.

New S&W 19: Three Mountain Power rejects this proposal to impose a new monthly pumping cap. Three Mountain Power submitted a detailed mitigation plan limiting its annual groundwater pumping over five months ago. In the many, many discussion we have had on the limits on Project pumping since that time (and before), there was never any suggestion that pumping should also be limited on a monthly basis. This proposal is inconsistent with other provisions of both Staff's and Three Mountain Power's proposed conditions, which both recognize that monthly pumping will be variable. This is a completely new proposal; it is completely unwarranted and wholly unacceptable to Three Mountain Power.

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As you know, on every possible occasion since Three Mountain Power submitted its detailed mitigation proposal for the Project over five months ago, Three Mountain Power has emphasized the critical importance of receiving a final certification decision for the Project by the end of the first quarter of 2001. Failure to meet this important milestone date will eliminate *any* possibility that Three Mountain Power's 500 MW of capacity and energy will be made available to California customers by the summer of 2003. This important milestone is now just two months away. Three Mountain Power will make every reasonable effort to reach agreement, at the February 5 workshop, on reasonable well interference mitigation conditions. If agreement is not reached at the February 5 workshop, however, Three Mountain Power will respectfully request that the Committee proceed to publish the Presiding Member's Proposed Decision on schedule so that a final Commission decision can be reached before the end of March 2001.

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Sincerely,

Ann MacLeod

cc: CEC Docket Office
Three Mountain Power email POS list